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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**AMBER KRISTI MARSH** and  
**STACIE EVANS**, individually and on  
behalf of a class of similarly situated  
persons.

## Plaintiffs.

vs.

## ZAAZOOM SOLUTIONS, LLC, et al.,

## Defendants.

## **CLASS ACTION**

Case No. 3:11-cv-05226-RS

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS ZAAZOOM SOLUTIONS,  
LLC, ZAZA PAY LLC, AND  
AUTOMATED ELECTRONIC  
CHECKING, INC.'S MOTION TO  
DISMISS PURSUANT TO FED. R. CIV.  
P. 12(B)(1) & 12(B)(6)**

DATE: TBD  
TIME: 1:30 PM  
CTRM: 3, 17<sup>th</sup> Floor  
JUDGE: The Hon. Richard Seeborg

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1 Plaintiffs Amber Kristi Marsh and Stacie Evans, by and through their counsel of  
2 record, respectfully submit the following memorandum of points and authorities in  
3 opposition to Defendants Zaazoom Solutions, LLC, Zaza Pay LLC, and Automated  
4 Electronic Checking, Inc. (collectively, "Moving Defendants")'s motion to dismiss under  
5 Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **INTRODUCTION**

8 Defendants operate a scam where they lure people into applying for payday loans  
9 on Internet websites. Defendants take the information they gather from the payday loan  
10 applications—including the applicants' banking information—and use this information to  
11 forge checks on behalf of the applicants. These checks are fakes; they are created  
12 without the applicants' knowledge or consent. These checks supposedly pay for the  
13 Defendants' online coupon services, though no applicant ever agreed to buy such  
14 services. The money is transferred from the applicants' checking accounts to Defendants  
15 before the applicants realize that the forged checks have been drawn or that withdrawals  
16 have been made. Defendants have performed this scam thousands of times, and robbed  
17 people, already in a frail financial condition, of their remaining money.

18 Moving Defendants make two arguments in their motion to dismiss. First, Moving  
19 Defendants argue that Plaintiffs' state law claims are preempted by the Restore Online  
20 Shoppers' Confidence Act, 15 U.S.C. §§8401 *et seq.* ("ROSCA"). Second, Moving  
21 Defendants argue that Plaintiffs do not have standing to assert claims under California law  
22 because, according to Moving Defendants, their misconduct occurred outside of  
23 California.

24 Both of Moving Defendants' arguments fail. First, contrary to Moving Defendants'  
25 argument, the lack of a private cause of action in ROSCA does not result in the  
26 preemption of California laws that do provide a private right of action. To the contrary,  
27 "the absence of a private cause of action means that Congress has obviously left plenty  
28 of room for the states to supplement the [statute] by providing for private causes of

1 action." *Consumer Justice Ctr. v. Olympian Labs, Inc.*, 99 Cal. App. 4th 1056, 1059-60  
 2 (2002). Second, California law is clear that Plaintiffs are entitled to rely on California law  
 3 to redress Defendants' misconduct, even if that misconduct occurred outside of California,  
 4 where it resulted in injury to Plaintiffs in California.

5 For these reasons, and as explained more fully below, the Court should deny  
 6 Moving Defendants' motion to dismiss.

## 7 BACKGROUND

8 Defendants Zaazoom Solutions, LLC, Zaza Pay LLC, MultiECom, LLC, and Online  
 9 Resource Center, LLC (collectively, the "Zaazoom Defendants") provide online coupon  
 10 services though various Internet websites, including but not limited to  
 11 <libertydiscountclub.com>, <777discountclub.com>, <247discountclub.com>,  
 12 <grocerysavingsdirect.com>, <couponsinyourmailbox.com>, <websavingsclub.com>,  
 13 <savingclub247.com>, <discountclub247.com>, and <uclipusave.com> (collectively, the  
 14 "Defendants' Websites"). (Second Amended Complaint ("SAC") ¶55.) Theoretically, a  
 15 consumer can sign up to become a member of one of Defendants' Websites voluntarily,  
 16 by entering his or her contact and banking information. (SAC ¶57.)

17 Despite the foregoing process, the members of the Zaazoom Defendants'  
 18 Websites did not become members voluntarily. (SAC ¶58.) Rather, the Zaazoom  
 19 Defendants registered people without their knowledge or consent. (SAC ¶58.)  
 20 Specifically, the Zaazoom Defendants obtained information regarding individuals  
 21 ("Applicants") from payday loan websites. (SAC ¶59.) Without the Applicants'  
 22 knowledge or consent, the operators of the Payday Loan Websites transferred the  
 23 Applicants' personal information—including the Applicants' checking account  
 24 information—to the Zaazoom Defendants. (SAC ¶62.) The Zaazoom Defendants then  
 25 used the Applicants' personal information to register the Applicants for memberships with  
 26 Defendants' Websites. (SAC ¶63.) Next, the Zaazoom Defendants drafted remotely  
 27 created checks from the Applicants' checking accounts payable to the Zaazoom  
 28

1 Defendants. (SAC ¶65.) The Applicants were completely unaware that the Zaazoom  
 2 Defendants were drafting or depositing these remotely created checks. (SAC ¶65.)

3 The Zaazoom Defendants engaged payment processors to assist with the  
 4 creation, batching, and depositing of the remotely created checks. (SAC ¶72.)  
 5 Defendants Jack Henry & Associates, Inc. dba ProfitStars, Data Processing Systems,  
 6 LLC, and Automated Electronic Checking, Inc. (collectively, the "Processors") served as  
 7 payment processors for the Zaazoom Defendants. (SAC ¶73.) The Processors  
 8 deposited these remotely created checks in the Zaazoom Defendants' depositary bank  
 9 accounts with Defendants First Bank of Delaware, First National Bank of Central Texas,  
 10 and SunFirst Bank (collectively, the "Depositary Banks"). (SAC ¶¶87-89.)

11 Defendants' scam has injured consumers throughout the country, and in California  
 12 in particular. Each of the Plaintiffs resides in California. (SAC ¶¶39-40.) Each Plaintiff  
 13 had her banking information wrongfully taken by Defendants and used to forge remotely  
 14 created checks made payable to the Zaazoom Defendants. (SAC ¶¶98-126.) Plaintiffs  
 15 are far from alone. Defendants have used this scam to take advantage of thousands-  
 16 upon-thousands of people, including thousands-upon-thousands of California residents.  
 17 (SAC ¶15.) In total, Defendants have drawn more than 1,121,141 remotely created  
 18 checks in perpetrating their scam, including 101,494 checks on Californians.

### 19 ROSCA

20 On December 29, 2010, President Obama signed into law the Restore Online  
 21 Shoppers' Confidence Act, 15 U.S.C. §§8401 *et seq.* Section 2 of ROSCA, 15 U.S.C.  
 22 §8401, contains Congressional findings and a declaration of policy. This section states  
 23 that consumer confidence is essential to the growth of e-commerce, but that numerous  
 24 companies have been taking advantage of consumers in the online context by using  
 25 aggressive sales tactics, such as passing consumers' billing information to third parties  
 26 and using negative option features.<sup>1</sup>

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27 <sup>1</sup> ROSCA, 15 U.S.C. §8403, incorporates the definition of "negative option" from the  
 28 Federal Trade Commission's Telemarketing Sales Rule, 16 C.F.R. §310.2(u), which  
 defines a negative option as, "in an offer or agreement to sell or provide any goods or

Section 4 of ROSCA, 15 U.S.C. §8403, sets forth the requirements for online merchants to use negative options. Specifically, before a merchant can use a negative option, the merchant must: a) provide text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information, b) obtain the consumer's express informed consent before charging the consumer, and c) provide simple mechanisms for a consumer to stop recurring charges. See 15 U.S.C. §8403.

Sections 5 and 6 of ROSCA, 15 U.S.C. §§8403-8404, describe the authority of the FTC and the states' attorneys general to enforce ROSCA through civil actions. Despite Defendants' claim, ROSCA does not contain an express preemption clause.

## **PROCEDURAL BACKGROUND**

On May 9, 2011 Plaintiffs filed their initial complaint in the California Superior Court for San Francisco County. On September 23, Plaintiffs filed their Second Amended Complaint, which added Moving Defendants as parties. On, October 26, Defendant Jack Henry & Associates, Inc. removed this action to this Court. On November 8, Moving Defendants filed their motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) [D.E. No. 12.]

## **ARGUMENT**

Moving Defendants offer two arguments in their motion. First, Moving Defendants argue that ROSCA preempts Plaintiffs' state law claims because ROSCA does not have a private right of action. Moving Defendants have cited no authority for their claim that a federal law's lack of a private right of action results in the preemption of otherwise consistent state laws. To the contrary, courts in this Circuit have consistently held the exact opposite: that the lack of a private right of action in a federal law does not result in the preemption of otherwise consistent state laws. Thus, federal and state courts in California routinely allow the use of federal laws without private causes of action as

services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer."

1 predicates for violations of California Business & Professions Code section 17200—a law  
2 that borrows violations of other laws and treats them as independently actionable  
3 unlawful practices. Thus, the Court should deny Moving Defendants' motion to dismiss  
4 to the extent it is based on preemption.

5 Moving Defendants also argue that Plaintiffs lack standing to assert claims under  
6 California law because, according to Moving Defendants, the claims in this case arose  
7 elsewhere. This argument fails where the SAC specifically alleges that Plaintiffs are  
8 California residents who suffered harm in California. As California case law makes clear,  
9 California law applies to wrongful conduct that results in injury in California, regardless of  
10 whether the conduct occurred out-of-state.

11 For these reasons, and as explained more fully below, the Court should deny  
12 Moving Defendants' motion to dismiss.

13 **A. Moving Defendants fail to explain how ROSCA supposedly preempts  
14 Plaintiffs' state law claims.**

15 Moving Defendants argue that ROSCA preempts Plaintiffs' state law claims.  
16 There are two cornerstones of preemption analysis. *Wyeth v. Levine*, 555 U.S. 555, 565  
17 (2009). First, the purpose of Congress is the ultimate touchstone in every preemption  
18 case. *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Second, in all  
19 preemption cases, and particularly in those in which Congress has legislated in a field  
20 which the states have traditionally occupied, courts must start their analysis with the  
21 assumption that the historic police powers of the states are not to be superseded by the  
22 federal law unless that was the clear and manifest purpose of Congress. *Id.* (quoting  
23 *Medtronic*, 518 U.S. at 485).

24 A federal law may preempt a state law in three ways. First, Congress may  
25 preempt a state law by expressly explaining the preemptive effect of the federal statute in  
26 the statute itself. See *Aguayo v. U.S. Bank*, 653 F.3d 912, 918 (9th Cir. 2011) (quoting  
27 *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002)).  
28 Second, preemption may be inferred when federal regulation in a particular field is so

1 pervasive as to make reasonable the inference that Congress left no room for the states  
 2 to supplement it. See *id.* Third, preemption may be implied when a state law actually  
 3 conflicts with the federal law. See *id.* The party contending that federal law preempts a  
 4 state law bears the burden of establishing preemption. See *Dorsett v. Sandoz, Inc.*, 699  
 5 F. Supp. 2d 1142, 1155 (C.D. Cal. 2010). Here, Defendants have made no such  
 6 showing.

7       **1. Contrary to Moving Defendants' argument, ROSCA does not contain  
       an express preemption clause.**

8       Moving Defendants appear to argue that ROSCA expressly preempts Plaintiffs'  
 9 state law claims because ROSCA does not have a private right of action. This argument  
 10 fails. Courts have routinely found that federal laws, which do not include private rights of  
 11 action, do not preempt otherwise consistent state laws that do provide a private right of  
 12 action. In fact, California state and federal courts routinely use federal statutes without  
 13 private rights of action as predicates for section 17200 claims. As examples:

- 14       • *Consumer Justice Ctr. v. Olympian Labs, Inc.*, 99 Cal. App. 4th 1056 (2002): In  
 15       this case, the court found that “it is also clear (indeed, as stressed by defendants  
 16       here) that there is no private right of action under the Federal Trade Commission  
 17       Act.” *Id.* at 1060. The court went on to state “our Supreme Court specifically  
 18       noted that, while the Federal Trade Commission Act and California’s unfair  
 19       competition law both prohibit a wide range of unfair practices, the federal law has  
 20       no private enforcement provision comparable to California’s. The obvious  
 21       conclusion to be drawn from the absence of a private cause of action is that  
 22       Congress did not intend the Federal Trade Commission to occupy the field of  
 23       redressing false advertising claims.” *Id.* (internal quotations omitted). Thus, the  
 24       court specifically rejected the argument that the Federal Trade Commission Act  
 25       preempted the plaintiff’s 17200 claim, stating that “the absence of a private cause  
 26       of action means that Congress has obviously left plenty of room for the states to  
 27  
 28

1           ‘supplement’ the Federal Trade Act by providing for private causes of action.” *Id.*  
 2           at 1061.

- 3           • *VP Racing Fuels, Inc. v. Gen. Petroleum Corp., 673 F. Supp. 2d 1073 (E.D. Cal.*  
 4           *2009)*: In this case, the court found that the plaintiff’s section 17200 claim was not  
 5           preempted by the Petroleum Marketing Practices Act. See *id.* at 1081-82. The  
 6           court went on to state that “California has provided that any unlawful business  
 7           practices, including violations of laws for which there is no direct private right of  
 8           action, may be redressed by private action under the UCL; it is not necessary that  
 9           the predicate law provide for private civil enforcement.” *Id.* at 1081.
- 10           • *Smith v. Chase Mortg. Credit Group, 653 F. Supp. 2d 1035 (E.D. Cal. 2009)*: In  
 11           this case, the court found that the Real Estate Settlement Procedures Act  
 12           (“RESPA”) did not preempt the plaintiff’s section 17200 claim. See *id.* at 1044-45.  
 13           The Court also stated that the fact that RESPA did not provide a private right of  
 14           action was not relevant to whether the statute could serve as a basis for the  
 15           plaintiff’s section 17200 claim. See *id.*
- 16           • *Smith v. Wells Fargo Bank, N.A., 135 Cal. App. 4th 1463 (2005)*: In this case, the  
 17           court found that that regulations issued by the Office of the Comptroller of the  
 18           Currency (“OCC”) did not preempt the plaintiff’s section 17200 claim. See *id.* at  
 19           1471-88. The court also stated that plaintiffs may bring section 17200 actions  
 20           even when the conduct violates a statute for which there is no private right of  
 21           action. See *id.* at 1479-80. “By borrowing violations of other laws, the UCL  
 22           deems those violations ‘unfair competition’ independently actionable under the  
 23           UCL. Virtually any law—federal, state or local—can serve as a predicate for a  
 24           section 17200 action. Therefore, a violation of a federal law or regulation may  
 25           serve as a predicate for a [UCL] action.” *Id.* at 1480. (internal quotations and  
 26           citations omitted).

27           As the above-described case law makes clear, a federal law’s limitation on private  
 28           rights of action is irrelevant to the preemption inquiry. Where Congress wants to preempt

1 a state law expressly, it uses clear language to that effect. See, e.g., *Pom Wonderful*  
 2 *LLC v. Ocean Spray Cranberries, Inc.*, 642 F. Supp. 2d 1112, 1121 (C.D. Cal. 2009)  
 3 (analyzing express preemption clause from Federal Food, Drug, and Cosmetic Act).  
 4 Because ROSCA does not contain an express preemption clause, Moving Defendants  
 5 are simply incorrect that ROSCA expressly preempts Plaintiffs' state law claims.

6       **2. Congress has not shown any intent to occupy the entire field of**  
 7       **consumer protection or online commerce such that all state laws in**  
 8       **this area are impliedly preempted.**

9       Moving Defendants do not contend that ROSCA preempts Plaintiffs' state law  
 10 claims under a theory of field preemption. Nonetheless, Plaintiffs dispose of this  
 11 argument to the extent the Court wishes to consider it.

12       Even absent an express preemption clause, Congress may still intend to preempt  
 13 state laws where it has adopted a scheme of federal regulation so pervasive as to  
 14 occupy the entire field of regulation. See *English v. General Electric Co.*, 496 U.S. 72, 79  
 15 (1990). Field preemption exists only where the intent of Congress is clearly manifested,  
 16 or implicit from a pervasive scheme of federal regulation that leaves no room for state  
 17 supplementation, or implicit from the fact that the federal law touches a field, such as  
 18 foreign affairs, in which the federal interest is so dominant that the federal system will be  
 19 assumed to preclude enforcement of state laws on the same subject. *Pac. Merch.*  
*Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1165 (9th Cir. 2011).

20       No field preemption exists with respect to ROSCA because Congress has not  
 21 shown any intent to occupy the field of consumer protection. Consumer protection is a  
 22 field traditionally regulated concurrently by both the states and the federal government.  
 23 See *Pom Wonderful LLC*, 642 F. Supp. 2d at 1122 (stating that "consumer protection  
 24 laws fall within the states' historic police powers to protect the health and welfare of their  
 25 citizens"). Based on this authority, California has adopted a number of consumer  
 26 protection statutes and has developed a robust set of jurisprudence interpreting those  
 27 statutes. In fact, California has adopted Business & Professions Code section 17600 et  
 28 seq. which closely tracks the requirements of ROSCA.

1 ROSCA is a short consumer protection statute, which addresses the specific  
2 issues of negative options and third party sellers in online commerce. Nothing in ROSCA  
3 evidences an intent to displace the states' traditional roles in protecting consumers. See  
4 15 U.S.C. §§8401 *et seq.* Nor does anything in ROSCA's legislative history suggest that  
5 the statute was intended to preempt state consumer protection laws. To the contrary,  
6 both the legislative history and ROSCA itself contain Congressional findings that the  
7 statute is designed to protect consumers in online transactions. See S. REP. No. 111-  
8 240 at *passim* (2010) (stating ROSCA "would protect online consumers from unfair and  
9 deceptive sales tactics on the Internet"). It would be patently absurd for Congress to  
10 enact a consumer protection statute with the purpose of depriving consumers the right to  
11 protect themselves under the law.

Because there is literally no evidence of any Congressional intent to occupy the entire field of consumer protection in online commerce, ROSCA does not impliedly preempt Plaintiffs' claims under a field preemption theory.

3. ROSCA does not conflict with Plaintiffs' state law claims or California law, and thus conflict preemption does not apply.

Moving Defendants do not contend that ROSCA preempts Plaintiffs' state law claims under a theory of conflict preemption. Nonetheless, Plaintiffs dispose of this argument to the extent the Court wishes to consider it.

Where Congress has not entirely displaced state regulation in a specific area,  
state law will still be preempted to the extent it actually conflicts with federal law. See  
*Chamberlain v. Ford Motor Co.*, 314 F. Supp. 2d 953, 957 (N.D. Cal. 2004) (quoting *Geier*  
*v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 884 (2000)). Thus, conflict preemption turns  
on the presence of an actual conflict. *Id.* There are two bases for conflict preemption.  
First, state law will be conflict-preempted where it is impossible for a private party to  
comply with both state and federal requirements. See *English v. Gen. Elec. Co.*, 496  
U.S. 72, 79 (1990). Second, state law will be conflict-preempted where that law stands as  
an obstacle to the accomplishment and execution of the full purposes and objectives of

1 Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In order for conflict-preemption  
 2 to exist, there must be clear evidence of the conflict; a speculative or hypothetical conflict  
 3 is not sufficient. See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th  
 4 Cir. 2009) *aff'd sub nom. Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968  
 5 (2011).

6 Because of the presumption against implied preemption, the defendant bears the  
 7 burden of showing that it was Congress's clear and manifest intent to preempt state law.  
 8 *Chamberlain v. Ford Motor Co.*, 314 F. Supp. 2d 953, 962 (N.D. Cal. 2004); see *Chamber*  
 9 *of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (stating that a high  
 10 threshold must be met if a state law is to be preempted for conflicting with the purposes  
 11 of a federal act). The Supreme Court and courts in the Ninth Circuit have identified the  
 12 narrow set of circumstances that warrant conflict preemption. As examples:

- 13 • *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 874-83 (2000): The Supreme  
     14 Court held that a lawsuit that sought to force a manufacturer to install airbags in  
     15 all of its automobiles conflicted with a Department of Transportation's regulation  
     16 that permitted a range of choices among different passive restraint devices and  
     17 thus provided for a nuanced, gradual introduction of airbags over time.
- 18 • *Gaeta v. Perrigo Pharm. Co.*, 562 F. Supp. 2d 1091 (N.D. Cal. 2008): In this  
     19 case, the plaintiff suffered liver injuries allegedly caused by the defendant's  
     20 nonprescription drug. See *id.* at 1093. However, the FDA had already engaged in  
     21 a comprehensive review regarding the safety of that drug and specifically  
     22 determined that a warning for risk of liver injury was not scientifically supported by  
     23 the available data. See *id.* at 1098. In that instance, the plaintiff's lawsuit, brought  
     24 in part on a failure to warn theory, conflicted with the express judgment of the  
     25 FDA. See *id.*

26 Moving Defendants have not—and cannot—point to any conflicts between  
 27 ROSCA and the California laws that serve as the bases for Plaintiffs' claims. Neither  
 28 Plaintiffs' claims nor the California laws on which they are based impose obligations

1 beyond those in ROSCA. Moving Defendants cannot argue that it is impossible for them  
 2 to comply with both ROSCA and the California laws at issue. Nor can Moving  
 3 Defendants argue that the California laws at issue somehow serve as an obstacle to the  
 4 accomplishment of ROSCA's objectives. To the contrary, Plaintiffs seek to use ROSCA  
 5 as a predicate for Moving Defendants' claims, including Moving Defendants' violation of  
 6 California Business and Professions Code section 17200. To wit, by violating ROSCA,  
 7 Defendants engaged in an unlawful business practice in violation of section 17200.  
 8 Thus, the laws are entirely consistent.

9 Because there is no conflict between ROSCA and the California laws at issue in  
 10 this case, there is no conflict preemption.

11       **4.     Moving Defendants' preemption authority is inapposite.**

12       In support of their preemption argument, Moving Defendants cite to three cases,  
 13 none of which is remotely similar to the issues in this action, and all of which rely on an  
 14 express preemption clause.

- 15       • *In re Tobacco Cases II*, 41 Cal. 4th 1257 (2007): In this case, the court found that  
          the plaintiff's section 17200 claim was preempted by the Federal Cigarette  
          Labeling and Advertising Act ("FCLAA"). The U.S. Supreme Court had previously  
          found that the FCLAA's ban on state regulation of advertising expressly  
          preempted state common law actions accusing tobacco companies of failing to  
          warn of the dangers of smoking. See *Cipollone v. Liggett Group, Inc.* 505 U.S.  
          504, 517 (1992). Based on the FCLAA's express preemption clause, the  
          California Supreme Court found that the plaintiffs' unfair competition claim was  
          preempted because it sought to impose on defendant tobacco companies a duty  
          not to advertise in a way that would encourage minors to smoke, where such  
          advertisements were based on concerns about the danger of smoking.
- 16       • *Tanen v. Southwest Airlines Co.*, 187 Cal. App. 4th 1156 (2010): In this case, a  
          customer who purchased a travel gift certificate from the defendant airline sued  
          the airline for violation of the California statute prohibiting the sale of gift

certificates with expiration dates. The court found that the plaintiff's claim was expressly preempted by the Airline Deregulation Act, which stated "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . ." The court found that the plaintiff's claims regarding travel gift certificates related to "services of an air carrier," and thus were expressly preempted.

- Miller v. Bank of American, N.A. (U.S.A.), 170 Cal. App. 4th 980 (2009): In this case, credit card customers of the defendant bank brought a class action alleging that the bank's payment due dates violated state holiday statutes. The court found that the National Banking Act and regulations promulgated under it by the Office of the Comptroller of the Currency expressly preempted certain state laws, where the federal regulations stated, "[e]xcept where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks."

As the above descriptions make clear, Moving Defendants' cases involved an express preemption, which ROSCA does not have. Moreover, each of Moving Defendants' cases involved a specific industry that is heavily regulated by the federal government (i.e. cigarette labeling, airlines, and banking). By comparison, ROSCA is a consumer protections statute, a field traditionally regulated concurrently by both the states and the federal government. See *Pom Wonderful LLC*, 642 F. Supp. 2d at 1122. Finally, none of Moving Defendants' cases based preemption on the lack of a private right of action in the federal law. Thus, Moving Defendants' authority is completely inapposite and has no bearing on this case.

In summary, because ROSCA does not contain an express preemption clause and does not otherwise evidence an intent to occupy the field of consumer protection, Moving Defendants have failed to meet their heavy burden of showing that ROSCA preempts Plaintiffs' claims. Thus, the Court should deny Moving Defendants' motion to

1 dismiss.

2 **B. Plaintiffs have standing to bring their claims.**

3 Moving Defendants appear to argue that Plaintiffs do not have standing to bring  
 4 claims under California and Arizona law because Plaintiffs have not alleged that the  
 5 misconduct at issue occurred in these states or affected Plaintiffs in these states. This  
 6 argument fails.

7 The complaint alleges that the Zaazoom Defendants are based in Arizona and  
 8 perpetrated their misconduct from Arizona. The complaint alleges that each Plaintiff is a  
 9 California resident and suffered harm in California as a result of Defendants'  
 10 misconduct.<sup>2</sup>

11 Contrary to Moving Defendants' apparent argument, the fact that Defendants are  
 12 located outside of California does not prevent Plaintiffs from relying on California laws  
 13 where Plaintiffs were harmed in California. "In the absence of any federal preemption, a  
 14 defendant who is subject to jurisdiction in California and who engages in out-of-state  
 15 conduct that injures a California resident may be held liable for such conduct in a  
 16 California court." See *Yu v. Signet Bank/Virginia*, 69 Cal. App. 4th 1377, 1391 (1999);  
 17 see also *Oracle Corp. v. SAP AG*, 734 F. Supp. 2d 956, 968 (N.D. Cal. 2010) (stating  
 18 that section 17200 "applies to wrongful conduct that occurs out-of-state but results in  
 19 injury in California, regardless of the injured party's citizenship"). This line of reasoning  
 20 applies to common law torts in addition to UCL claims. See *Integral Dev. Corp. v.*  
 21 *Weissenbach*, 99 Cal. App. 4th 576, 591 (2002) ("California has a manifest interest in  
 22 providing a local forum for its residents to redress injuries inflicted by out-of-state  
 23 defendants.") Because Plaintiffs were harmed in California, where they reside, they are  
 24 entitled to bring claims based on California law.

25 Similarly Plaintiffs are entitled to bring a claim under Arizona's Consumer Fraud

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26 <sup>2</sup> To the extent there is any ambiguity about where Plaintiffs were when their banking  
 27 information was misappropriated by Defendants and when Defendants forged checks  
 28 from Plaintiffs' bank accounts, Plaintiffs are prepared to amend their complaint to state  
 that they were in California.

1 Act, Ariz. Rev. Stat. §44-1521 *et seq.*, where the Zaazoom Defendants are based in  
2 Arizona and perpetrated their misconduct from Arizona. See *Holeman v. Neils*, 803 F.  
3 Supp. 237, 242 (D. Ariz. 1992) (“The [Arizona] Consumer Fraud Act provides an injured  
4 consumer with an implied private right of action against the violator of the act.”)

5 Because Plaintiffs are entitled to bring all of their state and federal claims, Moving  
6 Defendants' motion to dismiss should be denied.

7 **CONCLUSION**

8 For all of the reasons set forth above, the Court should deny Moving Defendants'  
9 motion to dismiss.

10 Respectfully submitted,

11 DATED: November 22, 2011

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13 Jeffrey M. Rosenfeld

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